United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7422

In The

United States Court of Appeals

For The Second Circuit

REGINALD V. SCHMIDT,

Plaintiff-Appellant,

vs.

RAYMOND T. McKAY and JOHN F. BRADY, representatives of a class of persons who were members of District 2 - Marine Engineers Beneficial Association - AFL-CIO in September 1971,

Defendants-Appellees.

On Appeal from the United States District Court, Eastern District of New York.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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On Appeal from United States District Court

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REPLY BRIEF OF PLAINTIFF-APPELLANT REGINALD V. SCHMIDT

Introduction

The brief of defendants-appellants Raymond T. McKay and John F. Brady ("defendants") consists substantially of misleading citations of cases, factual distortions and specious arguments. This reply brief seeks to correct only those misstatements of fact or law that appear to be most pertinent to the issues on appeal.

At the outset we note that defendants represent that it is "beyond dispute" that each of the claims of plaintiff-appellant Reginald V. Schmidt ("plaintiff") first arose in May, 1966. (D. Br. 8)* The contrary is in fact the case - plaintiff's position is that the claims arose when defendants breached their promises and thereby consummated the fraud on plaintiff - i.e., in September 1971 when plaintiff's application for a pension was denied. (P. Br. Points I-VIII)*

POINT I

DEFENDANTS MISSTATE THE CASES AND THE RECORD ON THE ISSUE OF THE TIME OF ACCRUAL OF THE CAUSE OF ACTION

Defendants cite Edlux Construction Corp. v. State of New York, 252 App. Div. 373, 300 N.Y.S. 509 (1937), aff'd, 277 N.Y. 635 (1938) as authority for the proposition that the causes of action in contract and promissory estoppel accrued on November 16, 1966, when plaintiff supposedly had the "opportunity to enforce [defendants'] obligation." (D. Br. 8; see also id at 24, 25). What defendants fail to point out is that Edlux stands for precisely the opposite proposition, i.e., that a cause of action does not accrue until the promisor has failed to perform his obligation and thus breached the agreement. In Edlux the Court rejected the promisor's argument that the cause of action accrued when the promisee, a contractor, ceased the performance of his obligations, and held the action

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* Numbers preceded by "D. Br." and "P. Br." refer to pages of defendants' brief and plaintiff's brief respectively.

did not accrue until the much later time when the State formally rejected the contractor's claim for payment in full. 300 N.Y.S. 511-513. The precise analogy in the case at bar is the denial of plaintiff's application for a pension in 1971, when a reasonable time for defendants to perform their promise had elapsed.

As to the doctrine of reasonable time for performance, defendants advance the patently false argument that their promises involved only the "simple payment of money" (D. Br. 17) and thus were required to be performed on November 16, 1966. As the Second Amended Complaint ("Complaint") demonstrates, the promises involved an undertaking to arrange for a change in the terms of the pension plan to be accomplished by the Trustees. (8a)* Only if such undertaking failed were defendants obligated to accomplish the promised result by another means - the making of direct contributions by MEBA. Even the latter promise is quite different from the "simple payment of money", and the former promise does not involve the payment of money at all. Thus defendants were required to perform their promise only within a reasonable time, in this case before disposition of plaintiff's application for a pension in 1971.

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* Numbers followed by "a" refer to pages of the Joint Appendix.

POINT II

THE DOCTRINE OF ANTICIPATORY BREACH DOES NOT DEPEND ON UNCERTAINTY OF DAMAGES OR INCOMPLETE PERFORMANCE BY THE PROMISEE

While it is correct, as defendants observe, (D. Br. 22) that the Court in Ga Nun v. Palmer, 202 N.Y. 483, 489 (1911) commented that it would have been difficult to ascertain the damages sustained by the promisee at the time of the anticipatory breach, and that in both Ga Nun and Hochster v. De la Tour, 2 Ellis & Blackburn 678 (1853), the promisee had not yet had the opportunity to complete performance of her or his obligation under the contract, nowhere does either decision hold that such factors are necessary elements of the doctrine of anticipatory breach. The holding of Ga Nun and the dictum in Hochster are that the promisee always has the option of waiting to bring an action until the time when the opportunity for performance by the promisor of an executory contract has finally expired. In Ga Nun this time was at the death of the promisor, and in Hochster it was in June, 1852, the date when the defendants promised to engaged plaintiff in his employ. See also Corbin, Contracts, §962, 989 (One Volume Edition 1952).

In the case at bar the acts to be performed by defendant were not required to be performed within less than a reasonable time after November 16, 1966. Should the Court determine that failure by defendants to carry out their promises

at some time prior to disposition of plaintiff's application for a pension in 1971 constituted a breach of thei[illegible]reement with plaintiff, such brief would in any event be a[illegible]cory. The statute of limitations thus did not commence t[illegible]un before September, 1971.

POINT III

DEFENDANTS HAVE ADVANCED NO SUPPORT FOR THE CONCLUSION OF THE DISTRICT COURT THAT PLAINTIFF HAD AN OBLIGATION TO REQUEST CERTIFICATION OF HIS PENSION CREDITS FROM THE PENSION PLAN ON NOVEMBER 16, 1966

The only basis suggested by defendants for the conclusion of the District Court that plaintiff had an obligation to seek certification of his pension credits on November 16, 1966, is the "importance" of such certification (D. Br. 30). Assuming arguendo that such certification would have been "important", it does not follow from that fact that plaintiff had an obligation to seek it.

In any event, plaintiff's failure to seek certification was understandably based on his reliance on defendants' promises. It is in no sense inconsistent with such reliance, as argued by defendants (ibid), that defendants knew of the terms and provisions of the Pension Plan in May, 1966. It was precisely those terms and provisions that defendants promised to seek to have changed by the Trustees in order to assure that plaintiff would receive credit for all his past service. (8a) Brady's silence upon receiving plaintiff's expression of

confidence in the promises of McKay and Brady in 1967 furnished an additional reason for plaintiff to rely on those promises. (56a-57a; P. Br. 9-10)

POINT IV

THERE WAS NO DAMAGE SUSTAINED BY PLAINTIFF ON NOVEMBER 16, 1966

Defendants contend that plaintiff suffered certain types of damage on November 16, 1966, resulting in accrual of his cause of action on that day. The damage allegedly sustained at that time was:

(a) Plaintiff was required to continue to work in the maritime industry;

(b) Loss of a pension from Cities Service; and

(c) Loss of income from forsaking employment with Cities Service. (D. Br. 34-35)

There is nothing in the record demonstrating that any of these forms of damage took place on November 16, 1966 or at some later time. Indeed, it is obvious that they did occur sometime later. Hence they furnish no basis for the District Court's dismissal of the complaint on the ground that it was filed eleven days after expiration of the Statute of Limitations.

Moreover, the fact that plaintiff continued to work in the maritime industry was not caused by defendants' failure to perform their promises. Plaintiff continued to work because

he wished to accumulate an additional approximate five years of service in order to obtain the maximum pension based on twenty-five years of service.* Thus plaintiff's continued employment in the maritime industry was entirely consistent with his belief that when he ultimately decided to retire, defendants would have complied with their promises and assured that he would receive full past service credits for a pension in the maximum allowable amount.

It is important to note that the principal item of damage sustained by plaintiff, i.e. the denial of a pension based on the unavailability to him of credit for his past service with Cities Service, was not sustained until September, 1971. Thus the cause of action as to that item of damage did not commence to run until September, 1971.

Defendants have cited the case of Ryan Ready Mixed Concrete Corp. v. Coons, 25 App. Div. 2d 530, 267 N.Y.S.2d 627 (1966) in support of the proposition that plaintiff was entitled to bring this action in November, 1966. (D. Br. 37) Ryan stands for the contrary proposition that the cause of action did not accrue until the damage complained of was actually inflicted. In Ryan the Court held that the statute of limitations did not commence to run in 1958 when the defendant insurance brokers made misrepresentations to an insurer, but

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* While plaintiff's deposition does not cover this point, it can be inferred from the fact that upon his application for retirement plaintiff had accumulated a full twenty-five years of service in the maritime industry. See D. Br. 35.

in 1959 when the insurer, on the ground of defendants' earlier misrepresentations, denied coverage to the plaintiff for whom defendants had been obligated to place insurance.

POINT V

PLAINTIFF COULD NOT HAVE DISCOVERED THE FRAUD WITH REASONABLE DILIGENCE BEFORE SEPTEMBER, 1971

Defendants assert that plaintiff was aware of facts from which the fraud might reasonably have been inferred on November 16, 1966. These facts are (i) plaintiff's knowledge of the requirements for accruing credit under the Pension Plan; (ii) knowledge of the Pension Plan itself; and (iii) knowledge that the assurances of defendants were not being implemented in September, 1967, when plaintiff wrote to Brady (D. Br. 4)

As to facts (i) and (ii), as noted above at pp. 5-6, plaintiff's awareness of the provisions of the Pension Plan is a fact wholly consistent with his belief in and reliance on defendants' promises. As to fact (iii), such knowledge is completely immaterial to the question of the statute of limitations, inasmuch as the action was commenced on November 27, 1972, well within a six-year period following September, 1967.*

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* Pursuant to CPLR §213(8), the statute of limitations on fraud claims provides for a six-year period to commence running from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it. Pursuant to CPLR §203(f), an action based on fraud must be brought within two years after actual or imputed discovery or within the six-year period otherwise provided, computed from the time the cause of action accrued, whichever is longer.

In any event, even if plaintiff knew that defendants had not yet carried out their promises in September, 1967, such knowledge would not have put him on notice that defendants never intended to carry them out, in as much as the reasonable time for performance of their promises was September, 1971, when plaintiff's application for a pension was denied.

On the issues of both equitable estoppel and fraud, defendants cite Higgins v. Crouse, 147 N.Y. 411 (1895). In both respects defendants' reliance on Higgins v. Crouse is misplaced. While the Court of Appeals held in that case that a person is presumed to have known facts constituting fraud when he knows facts from which the inference of fraud follows, the Court held that on the facts of that case, which were similar to those in the instant case, no such knowledge should have been imputed to the plaintiff. 147 N.Y. at 415, 419.

CONCLUSION

For the reasons set forth above and in plaintiff's main brief, the Court should reverse the judgment of the District Court dismissing the Second Amended Complaint and remand the action for trial.

Respectfully submitted,

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JOHN H. DOYLE, III
Of Counsel

A 202 Affidavit of Personal Service of Papers

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

REGINALD V. SCHMIDT,
Plaintiff- Appellant,

- against -

RAYMOND T. McKAYetal.,
Respondents- Appellees,.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Kevin E. Thomas, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 1515 Macombs Road, Bronx, N.Y. 10452,
That on the 27th *day of* December *19* 76 *at* 50 Broadway, New York, NewYork

deponent served the annexed Brief *upon*

Markowitz & Glanstein

the Attorneys *in this action by delivering* 2 *true copy*s *thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 27th
day of December *19* 76

BETH A. HIRSH
NOTARY PUBLIC, State of New York
NO. 41-4623156
Qualified in Queens County
Commission Expires March 30, 1978

Kevin E Thomas
Print name beneath signature
KEVIN E. THOMAS

A 201 Affidavit of Service by Mail

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APEALS
SECOND ~~EXEN~~ CIRCUIT

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- against -

RAYMOND T. McKAY etal.,
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Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

I, Velma N. Howe, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 298 Macon Street, Brooklyn, New York 11216. That on the 27th *day of* December *1976 deponent served the annexed* Brief

upon 1) Levin & Weinhaus *attorney(s) for*
2) Smith & Kurlander
in this action, at 1) 515 Olive Street, St. Louis Mis. 63101
2) 1255 Post Street. San Franfisco, Cali
94109
the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 27th
day of December *19* 76

Beth A. Hirsh

BETH A. HIRSH
Notary Public, State of New York
No. 3505
Qualified in Kings County
Commission Expires March 30, 1978

Velma N. Howe

Print name beneath signature

Velma N. Howe